IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT :

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC

WEDNESDAY, THE 4TH APRIL 2007 / 14TH CHAITHRA 1929

OP.No. 4643 of 2003(C)

PETITIONERS:
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1. S.MUTHUKRISHNAN, SENIOR GRADE ASSISTANT, KERALA UNIVERSITY, RESIDING AT ANIZHAM, TC-28/2763(1), KUTHIRAVATTOM ROAD,KUNNUMPURAM, THIRUVANANTHAURAM-01.

2. P.K.VIJAYAKUMARAN NAIR, SENIOR GRADE ASSISTANT, KERALA UNIVERSITY, RESSIDING AT KAVADIKKATTAKKEL VEEDU, PEYAD P.O, THIRUVANANTHAPURAM.

3. S.VIKRAMAN, SENIOR GRADE ASSISTANT, KERALA UNIVERSITY, R/AT. PADMAVILASOM, NEDUMPA,PANAYAMUTTOM P.O., NEDUMANGAD.

4. NARASIMHA RAO V.L., SENIOR GRADE ASSISTANT KERALA UNIVERSITY, R/AT. 14-B, SREE NAGAR, MANACAUD P.O., THIRUVANANTHAPURAM-09.

5. P.S.MOHAMMED SHEREEF, SENIOR GRADE ASSISTANT, KERALA UNIVERSITY, R/AT.C/O.SALAAM STORES,AMBALAMUKKU,THIRUVANANTHAPURAM.

6. MORRIN.C, SENIOR GRADE ASSISTANT, KERALA UNIVERSITY, R/AT.T.C.76/1770, MULLOOR NAGAR, KADAKKAMPALLY, ANAYARA, THIRUVANANTHAPURAM.

7. C.SUDHAKARAN, SENIOR GRADE ASSISTANT, KERALA UNIVERSITY, R/AT.KARTHIKA, VELLAPALLI, NARUVAMOODU P.O., THIRUVANANTHAPURAM-20.

8. ABDUL NASSER.A., SENIOR GRADE ASSISTNAT,
KERALA UNIVERSITY, R/AT. AMAL BHAVAN, ROADUVILA,
CHERIYAVELINALLOOR P.O., KOLLAM DISTRICT-16.

9. A.VIJAYAN, SENIOR GRADE ASSISTANT,
KERALA UNIVERSITY, R/AT. THEERTHAM, NETTAYAM.

BY ADV. DR.K.P.KYLASANATHA PILLAY
SRI.ARUN.B.VARGHESE
SMT.SREEDEVI KYLASANATH
SRI.N.DHARMADAN (SR.)
SMT.SREEDEVI KYLASANATH

RESPONDENTS:
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1. UNIVERSITY OF KERALA, REP.BY THE
REGISTRAR, UNIVERSITY OFFICE,
THIRUVANANTHAPURAM.

2. VICE CHANCELLOR, KERALA UNIVERSITY,
THIRUVANANTHAPURAM.

3. STATE OF KERALA REP.BY THE SECRETARY TO
GOVERNMENT, HIGHER EDUCATION DEPARTMENT,
GOVERNMENT SECRETRIATE,
THIRUVANANTHAPURAM.

4. JACOB PHILIP, SELECTION GRADE ASSISTANT,
KERALA UNIVERSITY, THIRUVANANTHAPURAM.

5. A.S.MUKUNDAN, SELECTION GRADE ASSISTANT,
KERALA UNIVERSITY, THIRUVANANTHAPURAM.

BY ADV. SRI.M.K.CHANDRA MOHANDAS
SRI.N.NANDAKUMARA MENON
SRI.K.VINODKUMAR
SRI.P.K.MANOJKUMAR
SMT.LAKSHMI.N.MENON
SRI.S.GOPAKUMARAN NAIR, SC KERALA UTY.
SRI.M.RAJAGOPALAN NAIR, SC, KERALA UTY.

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD
ON 21/03/2007, THE COURT ON 4/4/2007 DELIVERED THE
FOLLOWING:

ORDER ON CMP 8143/03 IN OP 4643/03

DISMISSED.

SD/- ANTONY DOMINIC,JUDGE.

4/4/2007

APPENDIX

PETITIONERS' EXTS:

EXT.P1 TRUE COPY OF THE ORDER NO.Ad.A1.3.256/96/3 DATED 12/7/1996

EXT.P2 TRUE COPY OF THE REPRESENTATION SUBMITTED BY THE PETITIONER BEFORE THE 1ST RESPONDENT ON 17.6.1996.

EXT.P3 TRUE COPY OF THE ORDER NO.Ad.A1.3.256/96-3 DATED 19.7.96,ORDER NO.Ad.A1.3.3.256/96/3 DT. 12.7.96 AND ORDER NO.Ad.a1.3.1356/95/3 DATED 19.5.1995.

EXT.P4 TRUE COPY OF REPRESENTATION DATED 15.8.1996 SUBMITTED BEFORE THE 1ST RESPONDENT.

EXT.P5 TRUE COPY OF THE RELEVANT PART OF G.O.NO.7/96/GAD DATED 18.1.1996.

EXT.P6 TRUE COPY OF THE COUNTER AFFIDAVIT FILED BY THE RESPONDENTS DATED 14.3.1999.

EXT.P7 TRUE COPY OF REPLY AFFIDAVIT DATED 4.8.2002 FILED BY THE PETITIONERS.

EXT.P8 TRUE COPY OF THE JUDGMENT IN O.P.NO.13497/96 DATED 7.8.2002

EXT.P9 TRUE COPY OF THE MEMO BEARING NO.Ad.A1.3.40/2002 DATED 2.11.2002 ISSUED TO THE PETITIONERS.

EXT.P10 TRUE COPY OF THE HEARING NOTE DATED 19.11.2002 SUBMITTED BY THE PETITIONERS.

EXT.P11 TRUE COPY OF THE SUBMISSION FILED BY THE PETITIONERS.

EXT.P12 TRUE COPY OF THE SUBMISSION FILED BY THE PETITIONERS.

EXT.P13 TRUE COPY OF THE PROCEEDINGS NO.Ad.A1.3.36/2002 DATED 15.11.2002.

EXT.P14 TRUE COPY OF THE ORDER DATED 28.11.2002 ISSUED BY THE FIRST RESPONDENT REJECTING THE CLAIM OF THE PETITIONERS.

EXT.P15 TRUE COPY OF THE PETITION DATED 27.10.1997 SUBMITTED BY THE PETITIONERS BEFORE THE PAY REVISION COMMITTEE.

Antony Dominic, J.
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O.P.No.4643 of 2003
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Dated this the 4th day of April, 2007.

JUDGMENT

Petitioners in this Original Petition are the employees of the first respondent, the University of Kerala and the issue raised is with respect to their seniority in the category of Assistant Grade I. It is stated that the first petitioner joined service in 1987, petitioners 2,3,4,6 and 8 in 1988, 5th and 9th petitioners in 1989 and the 7th petitioner in 1991. They had passed Departmental Test during 1992, 1993 and 1994 and became eligible for promotion to the post of Selection Grade Assistant. Thereafter, when vacancies arose in the post of Selection Grade Assistant, the petitioners, having acquired the Departmental Test qualification, had become eligible for promotion and accordingly were promoted during various dates in 1993, 1994 and 1995. Subsequently, consequent upon the revision of the ratio of Assistants of various Grades as 1:1:1:1, apprehending that the dates of promotion of their juniors to the category of Assistant Grade I is likely to be preponed to 1.3.1992, which is much prior to the dates on which the petitioners were promoted to that category, they had

submitted Ext.P2 representation seeking the intervention of the University in the matter to prevent the same. Later, on 12.7.1996, the first respondent issued Ext.P1 order, which inter alia provided that sanction has been accorded by the Vice-Chancellor for the up-gradation of 101 Assistants Grade II as Assistants Grade I with effect from 1.3.1992, consequent upon the refixation of the ratio among the Assistants.

2. Ext.P1 was followed by Ext.P3 order of the University dated 19th July, 1997 promoting the Assistants Grade II mentioned therein as Assistants Grade I in the scale of pay of Rs.1350-2200 with effect from the dates indicated therein, against the vacancies that were created with effect from 1.3.1992 as mentioned herein above. To cut a long story short, at that stage an Original Petition was filed before this Court as O.P.No.13497 of 1996, which was disposed of by Ext.P8 directing that the matter be considered in the light of the grievances highlighted in the representation submitted by the affected parties and after hearing all of them. In pursuance to the judgment of this Court, after affording an opportunity to the affected parties, Ext.P14 order was passed by the Vice-Chancellor finding that there was no merit in the objection raised by the petitioners and others similarly situated and the submission made by them was accordingly rejected. Seeking

to quash Ext.P14 and contending that by virtue of Exts. P2, P3 and P14 their vested rights in the matter of seniority has been adversely affected, this Original Petition has been filed seeking appropriate reliefs.

3. Shri. Dharmadan, Senior Counsel mainly contended that by providing retrospectity, employees, who are juniors had a march over the petitioners. According to him, as the petitioners were test qualified on the dates when they were promoted, they had a vested right to have their seniority protected as on the date of their promotion and that by the impugned action, their such vested right has been affected.

4. Standing Counsel for the University and the counsel for the fourth respondent Shri.Nandakumara Menon contended that though the persons who were promoted by virtue of the impugned orders, are juniors to the petitioners, they had test qualified themselves long prior to the petitioners. It is submitted that by Exts.P2 and P3 when 101 vacancies were created for promotion to the post of Assistant Grade I from Assistant Grade II, such promotion could only be granted by promoting Assistants Grade II, who were test qualified and their eligibility for such promotion has to be determined with reference to the dates of occurrence of the vacancies. On this basis, it is contended

that as the so-called juniors were test qualified earlier than the petitioners,, they were entitled to be considered prior to the petitioners and that the petitioners, who for reasons of their own, got themselves test qualified later can have no grievance. In support of their contentions, counsel for the respondents relied on the judgments of this Court reported in **Varghese and Others** v. **State of Kerala and Others** - 1981 K.L.T. 458 and **Gopinathan Unnithan** v. **State of Kerala** - 1991(2) K.L.T. 112.

5. I have heard the counsel for the parties and considered their submissions.

6. Clause 9 of Part II, Chapter 4 of the Kerala University First Statutes, 1977, provides for probation and confirmation of non-teaching staff. Statute 10 provides that the University employees shall be required to pass such Departmental Tests or examinations within such period as may be prescribed by the Syndicate within the period of probation. It is not a matter of dispute that the provisions of the Kerala State and Subordinate Services Rules (K.S & S.S.R.) have been made applicable to the University employees and that Rule 28(a) of K.S.& S.S.R. provides that no member of a service or class of a service shall be eligible for promotion from the category in which he was appointed to the service unless he has satisfactorily completed his

probation in that category. Rule 28(bb) of K.S. & S.S.R. provides that promotion in a service or class which depends upon the passing of any examination (General or Departmental) shall ordinarily be made with reference to the conditions existing at the time of occurrence of the vacancies and not with reference to those at the time when the question of promotion is taken up for consideration. In the judgments mentioned above, this Court has settled the law that in the matter of promotion, the date with reference to which the eligibility of the candidates has to be reckoned is the date of occurrence of vacancy.

6. Thus, I have to proceed on the basis that for promotion to the post of Assistant Grade I, a pass in Departmental Test is an essential qualification and only those who have passed the Departmental Test will be eligible to be considered for promotion. Reference to Exts.P1 and P3 would show that 101 vacancies in the category of Assistant Grade I were created as on 1.3.1992 and that promotions were ordered to be made to those vacancies, retrospectively. In view of the rules mentioned above, only those Assistant Grade II, who were test qualified as on 1.3.1992 alone could have been promoted with effect from that date. If that be so, since the admitted position is that the Assistants Grade II, who were ordered to be promoted are those who, were test qualified, cannot be faulted

even if in the process, seniors who were not test qualified as on the date of promotion have been overlooked. For such misfortune of theirs, the seniors can only blame themselves and the University cannot be faulted.

7. Shri. Dharmadan, Senior Counsel who led the argument on behalf of the petitioners vehemently canvassed for the position that by retrospective promotion effected implementing Exts.P1 and P3, the vested rights that were created in favour of the petitioners have been taken away. On an anxious consideration of this argument, I am not in a position to agree with him for the reasons already stated. As already stated, when vacancies were created with effect from 1.3.1992, only those persons, who were test qualified could have been considered. Even if those vacancies were created on 1.3.1992 itself, the petitioners, who were though in service as on that date, could not have been considered for promotion as they were not test qualified. Therefore it is due to their ineligibility and their own delay in getting themselves qualified in the Departmental Test that they lost he opportunity.

8. As is evident from Exts.P14, after promoting the eligible candidates as on 1.3.1992 the remaining vacancies were left unfilled and candidates were considered for promotion as Assistants Grade I,

as and when they got themselves qualified subsequently. In this process, as is evident from Ext.P14 itself and the chart given in the counter affidavit, the petitioners were also promoted from the dates they acquired test qualification. Thus, this is not a case where the rights of the petitioners have been taken away. But on the other hand, the situation arose on account of their ineligibility as on the date of occurrence of the vacancies and petitioners themselves are beneficiaries also. I should mention that the prayers in this Writ Petition are so worded that the petitioners want to retain the benefit that they have derived in this process while at the same time they want the promotions effective from dates prior to that to be interfered. They should either seek to quash the whole proceeding or not at all and the attempt to retain what is in their favour alone is not permissible. This does not spell out a case of arbitrariness or violation of the fundamental rights of the petitioners warranting interference by this Court.

9. The petitioners have made reference to Ext.P5 and contended that in a similar situation, the Government interfered and the matter was set right by issuing the said order. According to them, this situation also requires to be addressed in the manner the Government have done in Ext.P5. Since, I did not find any illegality in the matter of

promotion effected consequent to Exts.P1 and P3, I do not find any legal ground for the petitioners to insist that an order in the nature of Ext.P5 should be issued in their case also. If at all by Ext.P5, the Government have set right a similar grievance, it is only a matter of concession and cannot be enforced through a proceeding under Article 226 of the Constitution of India.

9. Shri. Dharmadan relied on the judgments in **Kerala Panchayat Executive Officers Association** v. **State of Kerala** - 2000(3) K.L.T. 701, **Virender Singh Hooda and Others** v. **State of Haryana and Another** - A.I.R. 2005 S.C. 137 and **Mohan Raj** v. **Dimbeswari Saikai and Another** - A.I.R. 2007 S.C. 232, and contended that vested rights cannot be taken away. Though the legal position as canvassed by the learned Senior Counsel is unassailable, as already concluded by me, it is not a case where any vested rights of the petitioners have been taken away. In my view, Ext.P14 is unassailable and is liable to be upheld.

10. In the result, I find no merit in this Original Petition and the Original Petition is dismissed.

Antony Dominic
Judge.

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